

## Naval War College Review

---

Volume 22  
Number 1 *January*

Article 6

---

1969

# The National Executive and the Use of the Armed Forces Abroad

John N. Moore

Follow this and additional works at: <https://digital-commons.usnwc.edu/nwc-review>

---

### Recommended Citation

Moore, John N. (1969) "The National Executive and the Use of the Armed Forces Abroad," *Naval War College Review*: Vol. 22 : No. 1 , Article 6.

Available at: <https://digital-commons.usnwc.edu/nwc-review/vol22/iss1/6>

This Article is brought to you for free and open access by the Journals at U.S. Naval War College Digital Commons. It has been accepted for inclusion in Naval War College Review by an authorized editor of U.S. Naval War College Digital Commons. For more information, please contact [repository.inquiries@usnwc.edu](mailto:repository.inquiries@usnwc.edu).

# **THE NATIONAL EXECUTIVE AND THE USE OF THE ARMED FORCES ABROAD**

---

**A lecture delivered at the Naval War College  
on 11 October 1968**

**by  
Professor John N. Moore**

---

The breadth of my assigned topic "The National Executive and International Law" suggests that my mission this morning is about like that of the fan dancer; to call attention to the subject without really covering it. But rather than attempt a superficial survey of the range of problems in allocating the foreign affairs power between Congress, the President, and the Court, it may be more rewarding to instead concentrate on the currently most important of those problems, the power of the President to use the Armed Forces abroad.

Historically, the controversy over the war power and the controversy over the treaty power seem to have been the most important constitutional issues in the scope of the President's foreign affairs power. Of these, the treaty power controversy has been in at least a state of temporary quiescence since the heated controversy in 1954 over the Bricker amendment. With the defeat by a narrow margin of the Bricker amendment, which had been aimed at restricting the President's power to make international agreements, this controversy was resolved in favor of a con-

tinuing broad view of Executive authority. In contrast, the debate on Vietnam has heated white hot the controversy over the extent of Presidential power to use the Armed Forces abroad, and has generated a concern with Presidential power as insistent as any in our century.<sup>1</sup>

Basically the controversy concerns the authority of the President to order the Armed Forces into combat abroad and the question of when and how Congress must authorize the use of the Armed Forces abroad. Although this problem is presented more dramatically today than ever before, it is not new. Much of the current debate borrows argument from the clashes of Jefferson and Hamilton over the power of the President in the 1801 naval war against the Bashaw of Tripoli and from the rhetoric of President Polk and Representative Abraham Lincoln in the 1846 Mexican War.

The starting point of the debate is the Constitution, which gives Congress the power to declare war and to raise and support Armies and which makes the President the Commander in Chief and in practical effect the chief representative of the nation in foreign affairs. It seems reasonably clear from the debates at the Federal Constitutional Convention that most of the framers sought to place the major war power in Congress and to leave the President only the right to repel sudden attacks. The framers sought this restriction on Presidential power because of their fear of concentrated power in the President. But the convention debates are not very useful in telling us who has power in situations which may be short of war or in resolving controversy about how Congress might authorize the President to use the Army and Navy. Moreover, the Constitution is a living document, and its meaning is shaped by the experience of successive Congresses and Presidents in filling in its broad outlines and in adapting it to changing circumstances.

As Mr. Justice Frankfurter pointed out: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."<sup>2</sup> Nowhere is this statement or that of Mr. Justice Holmes that "the life of the law has not been logic: it has been experience"<sup>3</sup> been more apt than in the interpretation of the war power.

In the 180 years since the adoption of the Constitution, our nation has moved from a position of comparative isolation epitomized by Washington's warning to stay clear of entangling alliances to one of intense international involvement evidenced in 1968 by agreements for collective defense with 42 countries. In the same period the international system has shifted from a balance of power system to a loose bipolar system marked by intense global competition among competing public order systems and a nuclear balance of terror. And international law has moved from the notion of a just war to the prohibition of all force as a means of major change under the U.N. Charter. The increasing involvement of the United States in world affairs, the shift to an intensely competitive bipolar system, and the limitation of the lawful use of force to defense have greatly strengthened the hand of the Executive in the contest with Congress over the war power. Hamilton and Jefferson fought over whether, in the absence of congressional authorization to use force, a Tripolitan cruiser must be released after capture by an American naval vessel. Jefferson took the position that in the absence of congressional authorization for U.S. Naval forces to go on the offense, the cruiser must be released after being disabled from committing further hostilities. But the contemporary debate is about the power to commit from a quarter to a half million troops in major wars such as Korea and Vietnam. As the contrast in subjects

debated shows, there has been a gradual increase in Presidential power to use the military abroad over this period, an increase which has accelerated during the 20th century.

Some commentators such as Professor Wormuth and Senator Fulbright tell us that the increase in Presidential power vis-a-vis Congress has gone too far. They paint a picture of Executive usurpation of authority. But though they have a great deal to show us, the trouble is that the frame they use may be too small. We cannot just look to the language of the Constitution or the experience of 150 years ago for the answer to problems and conditions not wholly anticipated. If we are to display a proper instinct for the jugular instead of an instinct for the capillaries, we must apply the policy of the framers to the diverse problems and conditions of today.

The policy of requiring congressional authority for the major use of force abroad as a check on Presidential power remains as valid today, if not more so, than in 1789. But problems of collective defense pursuant to treaty obligations, the need for implementation of sanctions under article 42 of the United Nations Charter, an increasingly global defense interdependence, the wide range of responses to situations of intrastate conflict, and the swiftness of modern attack militate against absolute answers based on that policy.

The nature of our problem is such that we are unlikely to find many of what Mr. Justice Frankfurter termed bright-line distinctions. It will help immeasurably, however, if we first briefly indulge in the luxury of a minimum of clarification about the nature of the major questions we must deal with. Although there are really many more, as a first-stage complexity it is convenient to take four questions. With each we are concerned with authorization to use the Armed Forces abroad in conflict situations.

First, what may the President do on his own authority without congressional authorization? Second, if congressional authorization is necessary, what form must it take? Must there be a formal declaration of war? Third, what terms of congressional authorization are valid? Can Congress delegate the authority to use troops abroad to the President, and, if so, how broad a delegation is permissible? Lastly, to what extent can the answers to the first three questions be resolved by the courts? Are they "political questions" or otherwise issues which it is unwise for a court to adjudicate? Failure to separate these questions has carried more than its share of confusion. I will deal with these one at a time and then apply them all to the Vietnam situation.

First, what may the President do on his own authority without congressional authorization?

There is no doubt that the President, acting on his own authority, may order the military to repel sudden attacks on the United States or American forces. The draft proposals of the Constitution initially contained language authorizing Congress to "make war," but at the instance of James Madison the language was changed from "to make war" to "to declare war." The reason given for the change was to leave to the President "the power to repel sudden attack." Beyond that, there is greater controversy. On the one hand, there are those who take a broad view of Presidential power such as Craig Mathews who writes:

Constitutional history has shown that the President can take military action under his independent powers whenever the interests of the United States so require. In the modern world the scope of America's interest can be determined only by reference to the state of affairs in the international arena as a whole and to the overall purposes of our foreign policy. Any rigid test of protectable interest would leave the nation dangerously unequipped for survival.<sup>4</sup>

Similarly, Under Secretary Katzenbach, in testifying recently before the Senate Foreign Relations Committee, said that he doubts that any President has ever acted to the full limits of his Presidential authority.<sup>5</sup> There is substantial precedent in history for this broad interpretation of Presidential authority. Former Assistant Secretary of State James Grafton Rogers tells us that in the over 100 uses of U.S. forces abroad from 1789 to 1945 that the Executive ordered the use on his own authority in at least 80.<sup>6</sup> And a 1951 study for the Committee on Foreign Relations says that: "Since the Constitution was adopted there have been at least 125 incidents in which the President, without congressional authorization, . . . has ordered the Armed Forces to take action or maintain positions abroad."<sup>7</sup>

Since these studies were completed we could add President Truman's use of a quarter of a million American troops in Korea, President Eisenhower's landing of the marines in Lebanon, President Kennedy's limited use of American forces in the Bay of Pigs invasion and as "advisers" in Vietnam, and President Johnson's landing of troops in the Dominican Republic. All of this certainly represents a substantial gloss which experience has placed on the Constitution.

On the other hand, those who take a narrow view of Presidential power, such as Professor Ruhl Bartlett in testimony before the Senate Foreign Relations Committee during the National Commitment hearings, point out that most of these actions, with the greatest exception being Korea, did not involve sustained hostilities or more than minor casualties.<sup>8</sup> Typically, they involved protection of U.S. citizens abroad, pursuit of pirates, alleged humanitarian intervention, reprisals, or consensual assistance to a recognized government. And protracted and sustained use of troops abroad resulting in substantial

casualties has usually been highly controversial; the Korean war and President Polk's initiation of the Mexican War of 1846 being prime examples.

Given this degree of disagreement by sincere and informed scholars, what guideposts are there for delimiting Presidential authority in those situations in which the President acts without congressional authorization? Although they can easily be overstated, there are some policy considerations which, in my opinion, suggest a need for substantial Presidential authority. First, there is a need for the President to be able to quickly react to sudden armed attacks threatening U.S. defense interests. The sudden attack in Korea and the rapid response of President Truman in initiating a process of troop commitment to Korea is, I believe, a real example of this need. Though subject to abuse, possibly some actions to protect American citizens abroad fall into an analogous category. The joint United States-Belgian rescue operation in the Congo and the first stage of the Dominican operation are examples. There is also sometimes a need for secrecy, decisiveness, and negotiating responsiveness which can best be met by Presidential action. In this category I would cite the actions of President Kennedy in the Cuban missile crisis. It seems to me that the wisdom of congressional debate about whether the response to the Soviet emplacement of medium-range ballistic missiles in Cuba should be quarantine, air strikes on the missile sites, invasion of Cuba, or no response at all, which is the debate which went on within the administration, is open to serious doubt. Robert Kennedy tells us in his account of the missile crisis that he doubts as satisfactory an outcome could have been achieved if the debate over alternatives had taken place in the full glare of publicity. And lest we succumb to the myth that the President is always hawkish and Congress is always dovish, we should remember Kennedy's account of

the hawkish pressures from leading Congressman during the missile crisis.

There is also a category of what might be called "ongoing command decisions," which are day-to-day decisions about the operation of existing military assistance programs within the network of U.S. defense interests or about defensive deployment of our Armed Forces. By their recurrent nature, many of these decisions inevitably will be left, in the first instance at least, to Presidential authority. Examples would be the conduct of established military advisory missions, military assistance programs, and intelligence missions necessary for national security. Moreover, I believe that some of the arguments for strictly limiting Presidential authority misconceive the nature of Presidential power and elevate form over substance. Presidential power, even in the exercise of the Commander in Chief power, is not autonomous and, as Richard Neustadt compellingly argues, is in large measure the power to persuade.<sup>9</sup> It is difficult for a President to pursue sustained military actions without the active support of a substantial segment of Congress and the American people. And although Congress would usually be reluctant to do so, if things got too bad Congress could refuse to appropriate funds or could even institute impeachment proceedings against the President. And short of these measures, the Congress can bring great pressure to bear on the President through the power of critical public hearings, as the Fulbright hearings on Vietnam perhaps more than adequately demonstrate.

Despite these reasons for some Presidential authority in the use of troops abroad, it neither seems wise nor necessary to encourage too great an expansion of Presidential power. Within the limits of survival in the world we live in, we should require the more broadly based authorization which only Congress can give and should strive to

revitalize the role of Congress in the making of foreign policy.

As a dividing line for Presidential authority in the use of the military abroad, one test might be to require congressional authorization in all cases where regular combat units are committed to sustained hostilities. This test would be likely to include most situations resulting in substantial casualties and substantial commitment of resources. Under this test, the Mexican War, the Korean war, and the Vietnam war would all require congressional authorization. The test has the virtue of responsiveness to precisely those situations historically creating the greatest concern over Presidential authority, but like all tests is somewhat frayed at the edges. In conflicts which gradually escalate, the dividing line for requiring congressional authorization might be initial commitment to combat of regular U.S. combat units as such. As to the suddenness of Korea, and conflicts like Korea, I would argue that the President should have the authority to meet the attack as necessary but should immediately seek congressional authorization. In retrospect, the decision not to obtain formal congressional authorization in the Korean war, in which the United States sustained more than 140,000 casualties, seems a poor precedent. And in those situations in which Presidential authority is based on the need for secrecy or immediacy of response, the need should be a real one.

To say that the President should have authority to act in some circumstances without congressional authorization is not to advise that he should not consult Congress or key congressional leaders. The President should involve Congress as much as practicable in every case. In fact, failure to pursue congressional involvement meaningfully when it could have been done has been the cause of a great deal of unnecessary Presidential grief. As Under Secretary Katzenbach points out "there can be no question

that . . . [the President] acts most effectively when he acts with the support and authority of the Congress."<sup>10</sup>

The second question is: When congressional authorization is necessary, what form should it take? Is a formal declaration of war required?

Much of the popular discussion about the war power seems to assume that a formal declaration of war is the only means of constitutionally obtaining congressional authorization for the use of the military. But this one is largely a red herring. As a matter of logic, the syntax of the Constitution that "Congress should have power . . . to declare war" does not mean that Congress may not authorize hostilities without a formal declaration of war. And as a matter of intent of the framers, the requirement is congressional control of hostilities, not a particular mode of authorization. This was so clear that within 12 years of the adoption of the Constitution no less an authority than Chief Justice John Marshall recognized in the case of *Talbot v. Seeman*<sup>11</sup> that congressional action not amounting to a formal declaration of war could be a valid congressional authorization of hostilities. The case arose out of the 1789 naval war with France, the first war of a fledgling United States. As a result of French raiding of American shipping, Congress had passed a series of acts suspending commercial relations with France, denouncing the treaties with France, and establishing a Department of the Navy and a Marine Corps. The Court treated these acts as congressional authorization for limited hostilities with France. Practice since then shows that Congress has declared war only five times, despite the much larger number of occasions on which the United States has been at war. There is little reason, then, to believe that a formal declaration of war is the only means of congressional authorization of hostilities. A joint congressional resolution, which must be approved by both

houses of Congress, authorizing the President to use the military abroad is certainly as Under Secretary Katzenbach puts it "a functional equivalent of the declaration of war."

There are also numerous policy arguments why the formal declaration of war is undesirable under present circumstances. Arguments made include increased danger of misunderstanding of limited objectives, diplomatic embarrassment in recognition of nonrecognized guerrilla opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President's domestic authority. Although each of these arguments has some merit, probably the most compelling reason for not using the formal declaration of war is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out "[T]here has not been a formal declaration of war-anywhere in the world--since World War II."<sup>12</sup>

More serious questions as to form of congressional authorization include to what extent can Congress authorize the President to engage in hostilities by prior approval of an international agreement? And to what extent can congressional acquiescence in appropriation measures constitute congressional authorization to engage in hostilities? One obvious problem with treaty authorization is that although the House of Representatives would participate in a declaration of war, it would not participate in treaty-making. This objection would be alleviated if the international agreement took the form of a congressional-executive agreement sanctioned by a joint resolution. Problems in recognizing appropriation measures as authorization include confronting Congress with a *fait accompli* and ascertaining the scope of congressional intent in a vote to approve an appropriation measure.

The third question is: What terms of congressional authorization are valid?

Can Congress delegate the authority to use troops abroad to the President, and if so, how broad a delegation is permissible?

The permissibility of congressional delegation of the war power to the President and exactly what constitutes a delegation have been disputed throughout U.S. history. In 1834 President Jackson sought congressional authorization to undertake reprisals upon French property unless France paid her outstanding debts for damages to American shipping during the Napoleonic wars. There were objections in Congress on the grounds that it would amount to an unconstitutional transfer of Congress' war power to the President, and Jackson did not get his resolution. Similarly, in 1857 President Buchanan sought congressional authorization to use the military at his discretion, if necessary to preserve freedom of communication across the Isthmus of Panama. Despite three requests, Congress refused to grant Buchanan the authority he requested. A principal argument against granting his request was that to do so would be a surrender to the President of Congress' war power. The objection was again raised by Senators opposed to President Wilson's request for congressional authority to take defensive measures in protection of American shipping. Corwin tells us that Wilson went ahead and armed American merchant vessels despite congressional inaction.

More recent experience has seen Congress take a broader view on the delegation issue. In the 1945 United Nations Participation Act, Congress provided for delegation of authority to the President to engage in hostilities if acting pursuant to an article 43 U.N. collective peace force agreement approved by Congress. Apparently, however, no such agreement has yet been approved by Congress. And in the 1955 Formosa Resolution, the 1957 Middle East Resolution, and the 1964 Tonkin Gulf Resolution, Congress authorized the President to use

force to assist certain areas if subjected to armed attack. In the case of the Formosa Resolution, the Middle East Resolution, and the Tonkin Gulf Resolution, all were passed over the objection of at least one Congressman, Senator Wayne Morse, that the resolution amounted to an "unconstitutional predeclaration of war." In none of these situations does the delegation issue seem to have been considered very adequately, and the practice is probably inconclusive.

Professor Wormuth, arguing largely on the basis of now defunct precedents of domestic delegation law, urges a strict antidelegation rule.<sup>13</sup> But the domestic delegation analogy concerned with the limits of congressional delegation of legislative power is not only questionable today, but is also of only limited usefulness in the war power context. The President has in his own right both substantial authority to use the military abroad and authority as Commander in Chief, neither of which are present in comparable degree in the domestic delegation cases.

And in view of the great power of the President to pursue a diplomatic course leaving Congress little choice but war, and his great discretion as Commander in Chief after formal congressional authorization is given, it seems somewhat quixotic to take a rigid antidelegation stance. Moreover, there are substantial problems in any antidelegation stance as to when Congress is granting authorization with full knowledge of the circumstances. And what is the standard for too broad a delegation? Certainly the test would be unrealistic if simply one of whether discretion is left to the President, as the President probably always has the right as Commander in Chief to refuse to order American troops into combat. And unless Congress speaks to the issue, he certainly has very crucial discretion as to theater of operations, weapons systems employed, and settlement terms, any of



which can be as decisive for conflict limitation as the original decision to use force.

It is hard to get away from the fact that the war power is in reality a joint executive-congressional power and that the President is always going to have a substantial discretionary role. The delegation problem is more likely to be resolved by a pattern of practice responding to felt needs than by overly neat *a priori* constitutional hypotheses. If there is to be a delegation test, I would suggest that it be one asking whether there has been meaningful participation by a Congress reasonably informed of the circumstances giving rise to the need for the use of U.S. forces.

The fourth question is: To what extent can the answers to the first three questions be resolved by the courts? Are they "political questions" or otherwise issues which it is unwise for a court to adjudicate?

The tradition of judicial review runs deep in the American system. But it is not every question that is suitable for judicial review. Considerations of lack of manageable standards and interference with another coordinate branch of Government are reasons which the Supreme Court has given for declining to decide a question. These considerations frequently arise in the separation-of-powers context and are all present to some degree in judicial determination of the scope of Presidential authority to use the Armed Forces abroad. For example, what could a court do which would not have a major adverse impact on the course of a war if it wanted to declare the war unconstitutional? This dilemma has led one ingenious advocate to argue that the Court should give a declaratory judgment in such circumstances. According to him, "a declaratory judgment would give little comfort to the other side in the negotiations since the Executive can always go to the Congress for a declaration of war if the negotiations break down."<sup>14</sup>

If that is the case, one wonders why the need for a declaratory judgment. And in any event, the suggestion shows a most unprofessional naivete in understating the possible impact of such a ruling.

For these and other reasons, a U.S. District Court in Kansas last July dismissed a class action instituted against the President, the Secretary of State, and the Secretary of Defense seeking a declaratory judgment that they had acted unconstitutionally in the Vietnamese war.<sup>15</sup> Though the scope of the President's authority to use the Armed Forces abroad is a constitutional question, it is a question in separation of powers with few manageable standards, often running great risk of serious interference with legitimate defense requirements, and which is probably subject to more lasting solution from the continuing interplay between the checks and powers of Congress and the President. Though I believe that a decision on the merits would uphold the constitutionality of the executive-congressional action in the Vietnam war, the refusal to adjudicate the issue is certainly the wisest course during the continuation of the conflict. There are, after all, other checks in our system than judicial review, the chief among them being the election of a President.

Let me briefly apply these tests to the constitutional issues in the Vietnam conflict. First, the present magnitude of the Vietnam war in terms of troop levels, casualties, and impact on the nation strongly militates for requiring congressional authorization. I would say that the point at which congressional authorization should be required in Vietnam was the initiation in February 1965 of the regular interdictive air attacks against the North and the first sustained use of regular U.S. combat units in the summer and fall of 1965.

And though I believe that at the current level of hostilities congressional authorization should be required, given

the Korean experience and the breadth of Executive authority acquiesced in by both Congress and the President for the last 50 years, argument to the contrary can certainly be in good faith.

Second, congressional authorization need not and should not take the form of a formal declaration of war. A joint resolution authorizing the use of combat forces in hostilities in Vietnam, such as the Tonkin Gulf Resolution of August 1964, is preferable and adequate. Preferable since there is no good reason to declare war, since a formal declaration of war might connote an objective of subjugating North Vietnam and thus widening the war, and since avoidance of NLF recognition at too early a stage in the negotiating process or prior to reciprocal concessions may be an important diplomatic goal. And adequate since Congress authorized President Johnson to use the Armed Forces "to assist any member or protocol state of SEATO requesting assistance in defense," and the President's use of U.S. forces in Vietnam pursuant to this resolution is constitutionally authorized executive-congressional action. Some argue that Congress was not aware of the magnitude of the war which it was authorizing, that the Tonkin Gulf Resolution was hurried through Congress with a sense of urgency precluding adequate consideration, that Congress was poorly informed as to the extent of attacks on American ships, and that therefore the resolution cannot be taken as sufficient congressional authorization. But the language of the resolution is certainly broad enough to include the present hostilities. It is that "Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." And I believe that a fair reading of the congressional debates in their entirety shows that although there was confusion and

disagreement about the scope of the authorization, the Congress and the Senate floor leader of the resolution, Senator Fulbright, were aware that Congress was giving the President the authority, within his discretion, to take whatever action he deemed necessary with respect to the defense of South Vietnam. In fact, that is the wording of an exchange on the floor of the Senate between Senators Fulbright and Cooper. The same exchange indicated an understanding that the resolution was intended to ratify the constitutional process requirement of article IV of the SEATO Treaty.<sup>16</sup>

Although consideration of the Tonkin Gulf Resolution was hasty, President Johnson clearly went to Congress because of his awareness of doubts raised during the Korean war as a result of President Truman's failure to request formal congressional authorization. The attacks on American ships in the Gulf of Tonkin were the opportunity but not the object of the resolution.

The Tonkin Gulf Resolution has also been attacked as an invalid delegation of the congressional war power. But even if there is a constitutional requirement as to the breadth of congressional delegation of the war power to the President, a proposition open to considerable doubt, the Congress which passed the Tonkin Gulf Resolution was, I believe,

---

## BIOGRAPHIC SUMMARY



Professor John Norton Moore is Associate Professor of Law at the University of Virginia School of Law. A graduate of Duke University School of Law, he holds a master of laws degree from the Uni-

versity of Illinois and is a doctoral candidate at Yale Law School. His writings on the lawfulness of U.S. action in Vietnam have been widely publicized.

---

reasonably informed of the circumstances giving rise to the need for the use of U.S. forces. It was aware that there was an ongoing guerrilla war in Vietnam which had been escalating since 1959, that the United States had had over 12,000 advisory troops there since 1962, a figure dramatically on the increase since then, and that recently the President had ordered retaliatory air strikes on facilities in the North. As such, Congress was validly exercising its war power no matter how desirable or illuminating additional debate might have been.

Although there are, as indicated, difficulties in reading too much into appropriation measures or other indicia of congressional authorization, the subsequent refusal to repeal the Tonkin Gulf Resolution and passage of military appropriation measures also lend some congressional authority to President Johnson's actions. This is particularly true of the \$700 million special Vietnam appropriation measure of May 1965. This measure, requested shortly after President Johnson's major step-up of the U.S. response, was billed as an

opportunity for expression of congressional opinion on the buildup.

Lastly, although there are those who argue for judicial review of the constitutionality of the authorization of the use of American forces in Vietnam, the lack of standards, the availability of other checks in the system, and the possibly grave impact on the course of negotiations strongly suggest the lack of wisdom of judicial review of such questions while the war continues. Without passing judgment on all future questions which may arise, the constitutional questions involved in the use of the Armed Forces in Vietnam should best be left to resolution between Congress and the President and almost certainly will be.

If in grappling with these questions there is a complexity that tends to overwhelm, or if we vacillate from time to time in our thinking as to precisely where the line should be drawn, we can take comfort in Arthur Schlesinger, Jr.'s point that sometimes the genuine intellectual difficulty of a question makes a degree of vacillation and mind changing eminently reasonable.

## FOOTNOTES

1. See generally on the national executive and the use of the Armed Forces abroad Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th rev. ed. (New York: New York University Press, 1957); Francis D. Wormuth, *The Vietnam War: the President v. the Constitution* (Santa Barbara, Calif.: Center for the Study of Democratic Institutions, April 1968); P. Kurland, "The Impotence of Relicence," *Duke Law Journal*, 1968, p. 619; John N. Moore and James L. Underwood, "The Lawfulness of United States Assistance to the Republic of Vietnam," *Congressional Record*, 14 July 1966, p. 14,943, 14,960-14,967, 14,983-14,989; Lawrence R. Velvel, "The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable," *Kansas Law Review*, v. XVI, 1968, p. 449; U.S. Congress, Senate, Committee on Foreign Relations, *U.S. Commitments to Foreign Powers*, Hearings (Washington: U.S. Govt. Print. Off., 1967); U.S. Congress, Senate, *National Commitments Report*, no. 797 (Washington: 1967).

2. Felix Frankfurter, "Youngstown Sheet and Tube Co. v. Sawyer," U.S. Supreme Court, *Decisions* (Washington: 1952), v. 343, p. 579, 593.

3. Mark DeW. Howe, *Justice Oliver Wendell Holmes* (Cambridge: Harvard University Press, 1957), v. 1, p. 26.

4. Craig Mathews, "The Constitutional Power of the President to Conclude International Agreements," *Yale Law Journal*, January 1955, p. 345, 365.

5. *U.S. Commitments to Foreign Powers*, p. 76.

6. James G. Rogers, *World Policing and the Constitution* (Boston: World Peace Foundation, 1945), p. 78.

7. A study prepared by the executive departments, *Powers of the President to Send the Armed Forces Outside the United States*, 28 February 1951.
8. *U.S. Commitments to Foreign Powers*, p. 9-21.
9. Richard E. Neustadt, *Presidential Power* (New York: Wiley, 1964).
10. *U.S. Commitments to Foreign Powers*, p. 76.
11. U.S. Supreme Court, *Decisions of the Supreme Court in the Case of the Amelia* (Washington: 1801), v. V, p. 1, 25.
12. Robert S. McNamara, "Address," *The New York Times*, 19 May 1966, p. 11:1-8.
13. Wormuth.
14. Velvel, p. 449, 484.
15. "Velvel v. Johnson," 287 F. Supp. 846 (1968).
16. "Maintenance of International Peace and Security in Southeast Asia," *Congressional Record*, 16 August 1964, p. 18,409-18,410. The relevant exchange was:

Mr. Cooper. . . Does the Senator consider that in enacting this resolution we are satisfying that requirement (the constitutional processes requirement) of Article IV of the Southeast Asia Collective Defense treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

Mr. Fulbright. I think that is correct.

Mr. Cooper. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. Fulbright. That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution. . . .

For a compilation of excerpts from the congressional debates supporting a broad interpretation of presidential authority under the Tonkin Gulf Resolution see Moore and Underwood, p. 14,943, 14,960-67, 14,983-89. For a highly selective compilation of excerpts suggesting a narrower interpretation see Velvel, p. 473-77. To resolve the controversy, a reading of the debates in their entirety is suggested.



The deterrence of war is the primary objective of the armed forces.

*Maxwell D. Taylor: The Uncertain Trumpet, 1960*